IN THE

Supreme Court of the United States

No. 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

ANITA REYOS, ET AL., *Petitioners*

v.

FIRST SECURITY BANK OF UTAH, N.A., UNITED STATES OF AMERICA, ET AL., *Respondents*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE NATIVE AMERICAN RIGHTS FUND, AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Native American Rights Fund respectfully moves the Court pursuant to Rule 42(2) and 42(3) for an Order granting leave to file the attached brief *amicus curiae* in the above-captioned cases. Respondent First Security Bank of Utah, N.A., has refused to consent to the filing of the brief. The other parties, including the Solicitor General on behalf of the Respondent United States, have granted their consent to the filing of this brief *amicus curiae*.

The Native American Rights Fund (herein referred to as the "Fund") is a private, non-profit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance. The Fund appears herein and submits this brief *amicus curiae* because of its general interest in the subject of termination legislation and in the treatment of Indians and Indian groups accorded by the United States thereunder. The Fund also has a specific interest in the effects, interpretation and application of the termination legislation here under review,[1] and in the protection of the rights of the mixed-blood members of the Ute Indian Tribe in connection with the termination process.

The Fund by this motion is seeking leave to file its brief at a time subsequent to the filing of Petitioners' brief. Accordingly, the Fund seeks an Order of the Court pursuant to Rule 42(2) as well as leave to file the brief pursuant to Rule 42(3). However, since it appears that none of the parties would be prejudiced by the filing of the Fund's brief at the present time, as set out hereinafter, we will discuss the reasons for granting the Motion principally in relation to Rule 42(3).

The issues raised in the accompanying brief relate solely to the legal relationship and attendant responsibilties between the United States and the mixed-blood group of the Ute Indian Tribe. No issues are raised which affect the remaining respondents in the case. Accordingly, the fact that the United States has

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[1] Ute Termination Act, Public Law 83-671, Act of August 27, 1954, 68 Stat. 868, 25 U.S.C., § 677, *et seq.*

consented to the filing of the brief at this time should weigh heavily in the Court's determination regarding leave to file.

Correspondingly, the fact that a single Respondent, the First Security Bank of Utah, has not consented to the filing of this brief *amicus curiae,* should not bear heavily in the Court's ruling upon this Motion.

In addition, the filing of the brief is sufficiently in advance of the Court's October Term, and the brief is sufficiently limited in scope, that we would anticipate no undue inconvienience for the Court by the filing of the Fund's brief at this time. Accordingly, the Fund respectfully requests that the Court, by Order issued pursuant to Rule 42(2), allow the Fund to file the accompanying brief.

This case presents issues of substantial and particular importance to the Fund. Several of these questions have been ably presented and analyzed in the briefs filed by Petitioners and by the Association on American Indian Affairs, Inc. However, two issues remain which have not been developed fully by other parties in the case.

The first such issue involves the continuing responsibility of the United States to the mixed-blood members of the Ute Tribe as those responsibilities are set out in the "Termination Act" here in question. This issue is complementary to, but different from, the question raised in the brief filed by the Association on American Affairs, Inc. That brief dealt directly and ably with the continuing trust responsibilities of the United States to the mixed-blood group following termination. The brief of the Fund, on the other hand, deals with the specific statutory rights of the mixed-blood group under the Termination Act without spe-

cific regard to any continuing trust obligation of the United States.

Of particular importance in this regard is the "right-of-first-refusal" established by section 15 of the act,[2] and whether such right inures to the benefit of the mixed-blood members as well as the full-blood members of the Tribe. The position of the Fund is that these statutory rights created by the Termination Act apply equally for the benefit of the mixed-blood members and cannot be abrogated by administrative action or oversight or ignored by the Courts.

The second issue of importance to the Fund and to the disposition of this case is the jurisdictional question raised in *Affiliated Ute Citizens, et al.* v. *United States.*

This question is of great significance to many groups of American Indians and has not been developed in the briefs filed by the other parties to these proceedings. The position of the Fund is that a jurisdictional basis exists for determining the claims presented in that action, and that the Court of Appeals below erred in holding otherwise.

The Fund, in its attached brief, presents a position to the Court on the foregoing issues which has not, and cannot adequately be represented by the other parties to the proceedings. The United States denies the statutory rights of the mixed-blood group under the Termination Act and further denies the jurisdictional claim of the Affiliated Ute Citizens. The Petitioners are interested primarily and properly in maximizing their monetary recovery and have, therefore, emphasized the question of specific liability under the securities laws of the United States. The Fund, on the

[2] 25 U.S.C., § 677n.

other hand, is most intimately concerned with broader statutory rights and duties which may affect the overall relationship between the United States and American Indians and their right to a forum for the redress of grievances occasioned by the action of the Government or others. Consequently, it presents a viewpoint to the Court which is different from that of the parties, and similar to that of the Association on American Indian Affairs, Inc.

For the foregoing reasons, the Fund requests that its motion for leave to file the accompanying brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF OF NATIVE AMERICAN RIGHTS FUND, AS AMICUS CURIAE

STATEMENT

The Native American Rights Fund (herein referred to as the "Fund") is a private, non-profit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance. The Fund appears herein and submits this brief as *amicus curiae* because of its general interest in the subject of termination legislation and in the treatment of Indians

and Indian groups accorded by the United States thereunder. The Fund also has a specific interest in the effects and application of the termination legislation here under review,[1] and the protection of the rights of the mixed-blood members of the Ute Indian Tribe in connection with the termination process.

It is the position of the Fund that the Ute Termination Act established certain specific statutory rights which inure to the benefit of the terminated mixed-blood members of the tribe as well as to the non-terminated full-blood group and that it was the responsibility and duty of the United States to protect and enforce such rights uniformly as between the two factions of the Tribe. It is the contention of the Fund that the United States has failed to discharge these responsibilities and duties to the mixed-blood group during the termination process and that, as a result, such rights have been abrogated unlawfully and withheld unreasonably from the mixed-blood group.

It is the further position of the Fund that there is a basis for the jurisdiction of the Court below to adjudicate the claims herein presented by individual Indians or groups thereof for a *pro rata* share of the minerals underlying the Uintah and Ouray Reservation, and that the Court below erred in concluding that jurisdiction was lacking.

By way of background, the Ute Termination Act, passed in 1954 as part of the now-discredited termination policy,[2] was the only termination act which sought

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[1] Ute Termination Act, Public Law 83-671, Act of August 27, 1954, 68 Stat. 868, 25 U.S.C. §677, *et seq.*

[2] See the President's Message to Congress on Indian Affairs, H.R. Doc. No. 363, 91st Cong., 2d Sess., 1970, in which the termination policy was characterized as "clearly harmful."

to apply the policy to less than an entire Indian Tribe. Under these circumstances, the mixed-blood members of the Ute Tribe [3] were visited with all the "clearly harmful" results of the termination process, together with the inequities arising out of the division, partition and allocation of tribal assets as between the full-blood and mixed-blood members of the tribe.

This case demonstrates, then, not only the failure of the termination process, but the egregious inequities which occurred when the Ute Tribe of Indians was split asunder by the termination process and a band of mixed-blood Indians was left virtually without a remedy in those matters requiring a division of property or an equitable allocation of rights as between the "full" and "mixed-blood" members of the Tribe. The inequities and injustices visited upon the mixed-blood members of the Tribe, and the restrictive and onerous interpretation of the Termination Act by the Court below, are clearly before this Court in the captioned cases and should be finally resolved.

A brief statement of the salient facts surrounding the transactions in question will serve to highlight the issues before the Court. In this regard, the Fund concurs in the allegations and assertions of the Petitioners that they are entitled to redress pursuant to the Securities Exchange Act of 1934.[4] However, the Fund has not undertaken to brief this issue, having

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[3] Note: Section 2 of the Ute Termination Act, 68 Stat. 868, 25 U.S.C., sec. 677a, defines "Full-Blood" as any member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one half. All others fall within the definition of "mixed-blood" subject to termination of the Federal trust relationship.

[4] 15 U.S.C., § 78a *et seq.*

chosen to confine itself to those aspects of the case which relate exclusively to Indian legislation.

The rights asserted by the Petitioners are those deriving from the Ute Termination Act,[5] which directed that the Federal trust relationship between the United States and the "mixed-blood" members of the tribe be terminated under the terms of the statute. Under the statute, certain assets were distributed to the mixed-bloods upon termination. Interests in other assets purportedly not susceptible to distribution (most notably gas, oil and mineral interests) were allocated between the mixed-blood and full-blood members of the Tribe. Title to these assets remained in the United States and the mixed-bloods were permitted to form associations for the management and handling of these assets.

The Ute Distribution Corporation (UDC) was organized, albeit without the consent of the mixed-blood group, to perform these functions on behalf of the mixed-bloods and to work in conjunction with the Tribal Committee which had authority to manage the full-bloods' interest in these tribal assets. The interest of the mixed-bloods in the UDC was manifest by some ten shares of stock issued to each mixed-blood member.

The Petitioners, each shareholders in UDC and members of the terminated mixed-blood group, disposed their respective shares of UDC stock, as did other mixed-blood members, in questionable and probably fraudulent transactions which occurred, for the most part, after the publication of the Termination Proclamation on August 26, 1961,[6] but before the

[5] *Supra*, note 1.

[6] 26 Fed. Reg. 8042.

date of August 27, 1964. The latter date, the tenth anniversary of the Termination Act, is of significance for reasons set forth hereinafter.

As a result of the transactions in question, and the lack of adequate supervision and control thereof by officials of the United States, the petitioners and most of the other mixed-blood shareholders of UDC lost and/or were deprived of their respective shares of the tribal assets or the value thereof. Moreover, during the termination process, the mixed-bloods were deprived of certain rights and privileges imposed and established for their protection by the Termination Act.

INTEREST OF THE NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE

The interest of the Native American Rights Fund as *amicus curiae* in these proceedings is set forth in the Fund's Motion For Leave to File Brief Amicus Curiae, to which this brief is appended.

ARGUMENT

I.

THE UTE TERMINATION ACT CREATED RIGHTS, DUTIES AND PRIVILEGES WHICH APPLY, WITH EQUAL FORCE AND EFFECT, TO BOTH THE "FULL-BLOOD" AND "MIXED-BLOOD" MEMBERS OF THE UTE TRIBE OF INDIANS

Throughout the proceedings below, and in related litigation,[7] the Court of Appeals for the 10th Circuit below has consistently held[8] or implied, that the Ute Termination Act[9] was passed for the primary, if not

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[7] See *e.g.*, Ute Indian Tribe of Uintah and Ouray Reservation v. Probst, 428 F.2d 491 (10th Cir. 1970).

[8] *Ibid.*

[9] Act of August 27, 1954, 68 Stat. 868, 25 U.S.C., §§ 677, *et seq.*

exclusive benefit, of those Indians who, by reason of arbitrary blood classifications, were to remain on the reservation subject to the Federal trusteeship. This implication pervades the proceedings below and immeasurably prejudices the rights of those members of the Tribe who were to fall victim to the vicissitudes of the termination process.

The tendency to favor those remaining under the Federal stewardship flows naturally from the spirit and effect of the misguided termination legislation. However, as the Fund submits and shows the Court more fully hereinafter, the Congressional intent in enacting the Ute Termination Act was neither to change the "Indian" status of the "mixed-bloods", nor to extend the protective features of the legislation to one group to the detriment of the other. To the contrary, the protective provisions of the Act were intended to apply equally to both factions of the Tribe or primarily, if not exclusively, to the mixed-bloods who were terminated.

A. The Court Below Erroneously Construed the Ute Termination Act To Create Rights in the "Full-Blood" Members of the Tribe to the Exclusion of the "Mixed-Blood" Members of the Tribe

To illustrate the obvious lack of concern for the "mixed-blood" members of the Tribe, we refer the Court to the Court of Appeals' analysis of section 15 of the Ute Termination Act [10] which vests certain rights and privileges in connection with the sale of property and assets received in distribution upon termination in the following terms:

> Any member of the mixed-blood group may dispose of his interest in the tribal assets prior

[10] 25 U.S.C., § 677n.

> to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period.

The trial court below found that this provision extended the Federal trusteeship or created a limited trusteeship with respect to all members of the Tribe (including the mixed-blood members subject to termination) and that the United States, therefore, had a continuing obligation to supervise the disposition of such assets and to discourage and prevent improvident and improper sales of such assets by both groups. The Fund subscribes to the view enunciated by the trial court, for it is likely that had the right-of-refusal been guaranteed to the mixed-blood group, as well as the full-bloods, the improvident and fraudulent sales by the individual mixed-bloods would not have been consummated. At very least, there would have been notice to the Affiliated Ute Citizens, and an opportunity to prevent the occurrence of such injustices.

On appeal, however, the Court of Appeals reversed the trial court on this issue, concluding that the foregoing provision creates ". . . no more than a typical right of refusal in the members of the Tribe or in the

Tribe".[11] The Court then avoided the question whether the mixed-blood are "members of the Tribe" for the purpose of exercising and taking advantage of the right-of-refusal provision of the Act[12] and proceeded to the conclusion that:

> The right of refusal thus created no duty on the part of the Government to the then terminated mixed-blood plaintiffs who were seeking to sell their shares of stock.[13]

The gist of the Court of Appeals' decision is that, upon termination, the mixed-blood members of the Tribe ceased to enjoy any of the protective provisions of the Termination Act or other related Federal legislation inasmuch as their status as "Indians" and wards of the Government had abruptly ended. In this, the Court below erred.

It is relevant to point out that the Ute Termination Act was directed at and applied to the mixed-blood members of the Tribe who were being terminated. The entire thrust of this legislation, like all of the termination acts, was the establishment of the terms and conditions under which such Indians would be removed from the public trust. Any effects of such laws upon Indians not terminated thereby were purely coincidental. This point is critical to an understanding of the current dispute.

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[11] 431 F.2d at 1342.

[12] The Court below cites the reader to Ute Indian Tribe of Uintah and Ouray Reservation v. Probst, 428 F.2d 491 (10th Cir. 1970), which, the Fund submits, erroneously concluded that the mixed-blood members do not enjoy the right-of-refusal privileges of the Act.

[13] 431 F.2d at 1343.

In this regard, the full-blood members of the Tribe remained, and remain today, under the trusteeship and protection of the United States. Those laws relating to the sale and disposition of restricted Indian property are as applicable today as they were at the time of termination of the mixed-bloods.

Under general principles of Indian law, such sales and disposition can occur only with the express consent of the Secretary of the Interior or his delegee and only then under strict statutory guidelines. The provisions of the Termination Act were intended merely to supplement this body of law and to apply only to the special situation created by the termination of Federal supervision over that portion of the Tribe found to be "mixed-bloods". No new or exclusive rights were vested in the full-blood members of the Tribe. Whatever new rights, privileges and duties were created by the Act applied either, (1) exclusively to those who were subject to the termination process or, (2) to the "members of the Tribe" generally which, for the purposes of the Act, included both the "full" and "mixed" blood members of the Tribe.

With respect to the latter point, the Fund invites the Court's attention to the definition of "Tribe" and its membership as set forth in the Act [14] and in the Regulations promulgated by the Secretary of the Interior thereunder.[15] The Regulations specifically include the mixed-bloods within the definition. This interpretation was adopted and applied by the Office

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[14] See section 2, 25 U.S.C. § 677a(a) which provides: "'Tribe' means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah."

[15] See 25 C.F.R., § 243.2(c): which provides: "(c) 'Member of the tribe' means all mixed-blood and full-blood members . . ."

of the Solicitor, Department of the Interior in an opinion issued November 30, 1956. The decision, which was included in the record before the Court in the *Reyos* case below, concludes that ". . . tribe as used . . . . throughout the Act, refers to both 'full-blood' and 'mixed-blood' members unless specifically limited to one or the other of these classes of tribal members. . .". (A copy of this opinion is reproduced in the Appendix hereto.) Thus, the interpretation by the Court below which excludes the mixed-blood from the "Tribe", renders the Regulations wholly superfluous and completely disregards the determination of the agency charged with the administration of the Termination Act.

The right-of-refusal established and extended to the "Tribe" and to members of the Tribe as defined in the Ute Termination Act was and is valuable property right. At all times relevant to these proceedings, the right-of-refusal was extended to and observed with respect to the "Tribe" and its full-blood members. Yet, at no time did the United States extend or seek to protect this right on behalf of the mixed-blood members individually or through their representative organization, Affiliated Ute Citizens of the State of Utah.

As this Court has reiterated many times,[16] and most recently in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), the abrogation or modification of the rights of Indians, whether created by statute or by Treaty, ". . . . is not to be lightly imputed to Congress".[17]

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[16] See, *e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Squire v. Capoeman, 351 U.S. 1 (1956); Choate v. Trapp, 224 U.S. 665 (1912).

[17] Menominee Tribe v. United States, *supra*.

Moreover, in the construction of statutes delineating the rights and privileges of Indians, this Court has taught that:

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States are to be resolved in favor of a weak and defenseless people . . . In view of the universality of this rule [legislation] should be liberally construed in their favor . . . .[18]

Nor should rights *created* by Congress be subject to administrative abrogation by officials of the Government.[19]

Even the Tenth Circuit Court of Appeals apparently has some difficulty with the question of the status of the mixed-blood Utes upon termination. In *Affiliated Ute Citizens of the State of Utah* v. *United States*,[20] one of the two cases before the Court in the present proceeding, the lower Court describes the mixed-blood members of the Tribe and their representative (Affiliated Ute Citizens of the State of Utah) in the following terms:

> The plaintiff is an unincorporated association organized for and on behalf of some 490 mixed-bloods *who were formerly or may now be members*

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[18] Choate v. Trapp, *supra*, 224 U.S. at 675. See also United States v. Santa Fe Pacific Railway Co., 314 U.S. 339 (1941), *reh. den.*, 314 U.S. 716 (1942); Leavenworth, etc., R.R. Co. v. United States, 92 U.S. 733 (1876); United States v. Shoshone Tribe, etc., 304 U.S. 111 (1938); and, Bennett County, South Dakota v. United States, 394 F.2d 8 (8th Cir. 1968).

[19] See United States v. Arenas, 158 F.2d 730, 747-48 (9th Cir. 1946); cert. denied, 331 U.S. 842 (1947).

[20] 431 F.2d 1349 (10th Cir. 1970).

of the Ute Indian Tribe of the Uintah and Ouray Reservation.[21]

The uncertainty of the Court of Appeals in the Affiliated Ute Citizens case below cannot be reconciled with the pronouncements of the same court in *Reyos* [22] and its holding in *Ute Indian Tribe of the Uintah and Ouray Reservation* v. *Probst,*[23] in the context of its refusal to extend the right-of-refusal provisions of the Termination Act to the mixed-blood members of the Tribe. According to the Court of Appeals in the latter case:

> . . . the first-refusal provision is primarily for the benefit of the Tribe and its full-blood members and only incidentally for the benefit of the selling mixed-blood.[24]

The Fund submits that the inconsistent and ambiguous treatment of the Court of Appeals with respect to the applicability of the right-of-refusal provisions of the Act, and its refusal to accord equal treatment to both factions of the Tribe, demonstrate a patent disregard for the rights and privileges of the "mixed-blood" Utes in the termination process, and a clear misconception of the letter and spirit of the Ute Termination Act.

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[21] 431 F.2d at 1350.

[22] *Supra,* footnote 11.

[23] 428 F.2d 491 (10th Cir. 1970).

[24] 428 F.2d at 497-98.

B. The Court Below Erroneously Concluded That All Duties and Responsibilities of the United States to the Mixed-Blood Members of the Tribe Ceased With the Publication of the Termination Proclamation

The Fund challenges the assumption, apparently indulged in by the Court of Appeals below, that, with the publication of the Termination Proclamation of August 26, 1961, all obligations and duties of the United States to the mixed-blood ceased along with Federal supervision over the individuals affected and their property rights for all purposes. This conclusion is demonstrably erroneous on the basis of the terms of the Act, the regulations thereunder, the legislative history of the Act and related legislation and the legal precedents applicable in the premises.

The Ute Termination Act, by its terms, established a continuing relationship and certain legal responsibilities between the United States and the mixed-blood members of the tribe. In this regard, sections 10, 15 and 16 of the Act [25] clearly contemplate the continuation of Federal supervision over a portion of the assets of the mixed-bloods, *i.e.*, those tribal assets not susceptible to partitioning and pro-rata distribution. In this regard, section 15 of the Act provides, *inter alia*, that:

> . . . In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary.

[25] 25 U.S.C., §§ 677i, 677n and 677o.

Section 16 also contemplates the continuation of Federal responsibilities with respect to other property rights of the mixed-bloods. This section established the procedure and terms under which the mixed-blood members of the tribe shall receive distributive shares of the tribal assets distributed to the mixed-bloods and provides that, upon such distribution:

> . . . Federal supervision of such [mixed-blood member] and his property shall thereby be terminated, *except as to his remaining interest in tribal property* in the form of any unadjudicated or unliquidated claims against the United States, *all gas, oil and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution* . . . (Emphasis added).

Similarly, section 10 of the Termination Act provides for a continuing responsibility on the part of the United States:

> All unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, *subject to such supervision by the Secretary as is otherwise required by law.* . . . (Emphasis added).

Thus, with respect to the property specified in the statute, the United States retained the duties and obligations of a trustee of such assets to the end that such assets were not dissipated through improvident sales or other forms of disposition.

The continuation of such responsibilities by the United States following the termination, in whole or

part, of the Federal trusteeship has been repeatedly recognized and sustained by this Court.[26] The adjudicated cases for the most part, confirm the right and duty of the United States to continue to administer, manage property or enforce restrictions upon the alienation of Indian property according to the terms and conditions specified by Congress upon the termination of Federal supervision or following any significant change in the status of Indians as dependent wards of the United States.[27]

Moreover, Congress has frequently provided that a limited trusteeship shall exist upon termination as to certain assets and this court has held that such provisions are neither unconstitutional nor inconsistent with the Congressional intent to ultimately end the Federal trust relationship.[28] Such provisions, as this Court has recognized, are frequently necessary to facilitate an orderly transition from a wholly dependent status to one of independence and ultimate assimilation into the society at large.

We need not here challenge the right of the Congress either to terminate Federal supervision over Indians

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[26] See, *e.g.*, Tiger v. Western Investment Company, 221 U.S. 286 (1911) (continuation of Federal trust responsibilities after rights citizenships were conferred); United States v. Waller, 243 U.S. 452 (1917); Brader v. James, 246 U.S. 88 (1918); Menominee Tribe v. United States, 391 U.S. 404 (1968) (enforcement of hunting and fishing privileges conferred by Treaty); Crain v. First National Bank of Oregon, 324 F.2d 532 (1963) (enforcement of specific individual trusts created upon termination).

[27] The issue first arose in connection with the continuation of Federal supervision over Indians and their property once Indians were extended the rights and privileges of citizenship. See authorities set forth in footnote 26, *supra*.

[28] See authorities cited in footnote 26, *supra*.

or its prerogatives in dictating the terms and conditions under which this is to be accomplished. Rather, we dispute the lower Court's conclusion that the ". . . limited aspects of the federal trust relationships" did not continue after promulgation of the termination proclamation, and that the United States owed no continuing duty to the mixed-blood members of the Tribe.

The statutory duties imposed in sections 10, 15 and 16 of the Act, as quoted hereinabove, clearly contradict the Court's conclusion. These duties, and the attendant fiduciary responsibilities of the United States with respect to the classes of property therein specified, extend beyond the date of the Act and the date of the Termination Proclamation and obtained at the time of the transactions in question. Indeed, to the extent that the United States holds title to and administers such property, even at the present time, such duties and responsibilities continue.

Moreover, contrary to the conclusion reached by the Court of Appeals, the Fund suggests and urges that the right-of-refusal provision of the Act,[29] if properly applied and administered for the benefit of all members of the Tribe,[30] established additional duties and responsibilities in the nature of a residual wardship or trust relationship which continued beyond the date of the Termination Proclamation. Indeed, had the Court below extended this right uniformly to all members of the Tribe without preference to the full-blood members of the Tribe, the existence of a corresponding trusteeship or wardship could not be open to question.

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[29] 25 U.S.C., § 677n.

[30] See section I-A, *supra*.

In refusing to recognize the continuing responsibilities of the United States, the Court of Appeals cites and relies upon *Crain* v. *First National Bank of Oregon*,[31] *Menominee Tribe* v. *United States*,[32] and *Klamath and Modoc Tribe* v. *Maison*,[33] for the proposition that express authority for a residual wardship or the continuation of the United States' trust relationship toward an Indian Tribe must be found in the termination legislation or stem from treaty obligations not abrogated by the Termination Act.

The Fund submits that the Court of Appeals relied upon a far too restrictive analysis of the cases cited and the doctrines enunciated therein. In this regard, it is clear that the *Crain* case stands for the proposition that "express trusts" created for the benefit of Indians "in need of assistance in conducting their affairs" are valid and enforceable notwithstanding that Federal supervision over the Tribe and its members has been terminated. The *Crain* case, however, does not purport to deal with the question of the creation of a continuing trust relationship or limited wardship by implication or by operation of law under the terms and conditions of the Termination Act or treaty rights.[34]

Here, the federal trusteeship or limited wardship is clearly contemplated, if not expressly created, in section 16 of the Act and arises by operation of law in connection with the right-of-refusal provisions of section 15 of the Act. Thus, we must deal here with ex-

[31] 324 F.2d 532 (9th Cir. 1963).

[32] 391 U.S. 404 (1968).

[33] 338 F.2d 620 (9th Cir. 1964).

[34] See, *e.g.*, Menominee Tribe v. United States, *supra* n.28.

press rights accorded and established by statute—rights far more explicit than those found to exist in the *Menominee* case where this Court had to look beyond the terms of the Menominee Termination Act to historic treaty rights which survived the termination process.

While the Fund is shocked at the action or inaction of the Bureau of Indian Affairs and the Secretary of the Interior in the transactions involved in this case and the resulting inequities to the individual petitioners, it is more acutely alarmed at the implications of the decision below sustaining such action and, the utter disregard of the plain provisions of the Act as well as a wealth of legal precedent[35] which has historically recognized the peculiar status of the Indian and extended him a legal basis and forum for the redress of grievances occasioned by the Government or others. In short, the decision of the Court of Appeals undermines settled principles of law applicable to Indian rights generally and, unless corrected by this Court, will gravely threaten the rights of Indians throughout the country.

II.

A CLEAR BASIS OF JURISDICTION EXISTS FOR ADJUDICATION OF THE CLAIMS PRESENTED IN AFFILIATED UTE CITIZENS v. UNITED STATES

In *Affiliated Ute Citizens of the State of Utah* v. *United States*,[36] the Court of Appeals below held that no jurisdictional basis exists for the adjudication of plaintiffs' claims for a *pro rata* share of the oil, gas

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[35] See, *e.g.*, United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941), *reh. den.*, 314 U.S. 716 (1942); United States v. Shoshone Tribe, 304 U.S. 111 (1938); Bennett County v. United States, 394 F.2d 8 (8th Cir. 1968).

[36] 431 F.2d 1349 (10th Cir. 1970).

and other minerals underlying the Uintah and Ouray Reservation. It is unclear whether the Court of Appeals based its determination partially upon the doctrine of sovereign immunity, as did the District Court below, or exclusively upon the lack of a jurisdictional statute conferring subject matter jurisdiction. In either event, The Fund submits that the Court of Appeals is in error.

A. If the Doctrine of Sovereign Immunity Is Not in Issue, the Jurisdiction of the United States District Court Is Clear

The decision of the Court of Appeals in the *Affiliated Ute Citizens* case does not rely specifically upon the doctrine of sovereign immunity in holding that the District Court was without jurisdiction to determine the claims of the mixed-blood members to their *pro rata* share of the minerals underlying the Uintah and Ouray Reservation. If such failure of reliance can be taken as tacit determination that the doctrine is not applicable under the present facts, it is clear that a jurisdictional basis for the claims exists.

In seeking the requested relief, the plaintiffs have relied almost exclusively upon certain provisions in the Ute Termination Act[37] and the duties of the Secretary of the Interior pursuant to the Act. Accordingly, an adjudication of the merits of the plaintiffs' claims would require an interpretation of Federal statutory law.

Since it is clear that Federal courts possess the authority necessary to decide all cases arising under and requiring an interpretation of the Constitution and

[37] 25 U.S.C. §§ 677-677aa; particularly 25 U.S.C. § 677o.

Federal statutes,[38] the necessary subject matter jurisdiction to decide the controversy is present[39] under the Federal question jurisdiction of the United States District Courts.

B. If the Court of Appeals Intended To Bar the Petitioners' Claims on the Ground of Sovereign Immunity, It Committed Reversible Error

1. General Equity Jurisdiction

It is important to discuss, at the outset, the defense of sovereign immunity in the context of this litigation. As heretofore pointed out, the United States holds legal title to the entire mineral estate of the Uintah and Ouray Reservation. The Affiliated Ute Citizens case was brought by a number of mixed-blood members of the Ute Indian Tribe seeking a conveyance of legal title to their equitable share of the mineral estate underlying the Reservation. The United States, in its capacity as holder of the legal title to the mineral estate, in effect, has acted in the past and continues to act as trustee on behalf of both the mixed-blood and full-blood Ute Indians for their share of the mineral estate.[40] Consequently, this case in its most fundamental

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[38] Cohens v. Virginia, 19 U.S. 383, 392 (1821).

[39] 28 U.S.C. § 1331. See Creek Indians National Council v. Sinclair Prairie Oil Co., 142 F.2d 842 (10th Cir. 1944); *cert. den.*, 323 U.S. 781 (1944); McCauley v. Makah Indian Tribe, 128 F.2d 867 (9th Cir. 1942). See also 28 U.S. § 1362.

[40] This trust relationship is confirmed by 25 U.S.C. § 677i, which provides, in pertinent part, that certain assets of the Tribe, including the mineral estate, "shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group *subject to such supervision by the Secretary as is otherwise required by law . . .*" (emphasis added). See also 25 U.S.C. § 677o and discussion in Section I-B hereof.

terms, involves an action by the holder of the equitable title to a mineral estate against the holder and trustee of the legal title.

Notwithstanding this direct and intimate legal relationship between the parties, the action below apparently was dismissed on the ground of sovereign immunity. The injustice of this tragic situation brings to mind the words of this Court regarding the defense of sovereign immunity in *United States* v. *Lee*:[41]

> It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime.

Once a trust relationship is established between the United States, as trustee, and a group of Indians, as beneficiaries of the trust, the district courts of the United States are vested with general equity jurisdiction to enforce the terms of the trust.[42] If such continuing equity jurisdiction of the district courts over trust relationships were to be abrogated by the doctrine of sovereign immunity, the jurisdictional power of the Federal courts would be meaningless and the trust beneficiaries would be forever barred from securing a judicial determination of the rights and responsibilities inherent in the trust relationship.

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[41] 106 U.S. 196, 218-219 (1882).

[42] See, *e.g.*, Crain v. First National Bank, 324 F.2d 532 (9th Cir. 1963), n. 6.

In that event, the United States would be free to dissipate the trust *res* and wholly disregard the rights of the trust beneficiaries since it would be completely beyond the scrutiny of the Federal courts. It would thus create the greatest injustices if the United States were allowed to hide behind the iron curtain of sovereign immunity in actions brought by the very individuals whom the Government has a fiduciary obligation to assist and protect. The exercise of the general equity jurisdiction of the district courts would go far toward eliminating the threat of such injustices.

2. 25 U.S.C. § 345

The fund fully concurs in the arguments advanced by petitioners that the necessary subject matter jurisdiction to decide this controversy is possessed by the Federal district courts pursuant to 25 U.S.C. § 345. That section of the United States Code provides, in pertinent part that:

> All persons who are in whole or in part of Indian blood or descent. . . . who claim to be . . . entitled to land under any allotment Act *or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any . . . parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress*, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties

thereto shall be the claimant as plaintiff and the United States as party defendant) . . . (Emphasis added).

At the outset, it is clear that the final quoted parenthetical phrase of the statute is an express waiver of sovereign immunity, and that the doctrine, therefore, in inapplicable in cases properly brought under the Act.[43] The present question, therefore, is whether the claim of the Affiliated Ute Citizens to a *pro rata* share of the minerals underlying the Uintah and Ouray Reservation is properly justiciable under the provisions of 25 U.S.C. § 345.

In denying the jurisdictional basis for such a claim by the Affiliated Ute Citizens, the Court of Appeals relied exclusively upon the determination that the claim was not for an "allotment" or "parcel" of land but, rather, for a "beneficial interest in the oil, gas and minerals" underlying the Reservation. However, by the very nature of the claim filed by plaintiffs in the *Affiliated Ute Citizens* case, it is clear that they are not seeking a "beneficial interest in the oil, gas and minerals", but, rather, a *pro rata* share in the mineral deposits underlying the Reservation.

Such a claim for a *pro rata* share in the mineral assets clearly falls within the provisions of 25 U.S.C. § 345, which creates jurisdiction for claims involving "land . . . under . . . any grant made by Congress . . .". There is nothing in the Act which indicates that it is applicable exclusively to claims for surface rights to land or to traditional Indian "allotments" and, indeed,

[43] See Simmons v. Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965); *aff'd per curiam*, 384 U.S. 209 (1966).

several courts have so held.[44] The minerals sought by plaintiffs in the *Affiliated Ute Citizens* case are no less interests in "land" within the intendment of 25 U.S.C. § 345 than were the construction charges and lien in *Scholder* v. *United States*,[45] or the beneficial interests created under an allotment in *United States* v. *Pierce*.[46]

The error of the Court of Appeals in the present case lies in the fact that it prematurely determined the merits of the claim rather than deciding the jurisdictional issue. The Court mistakenly and prematurely concluded that plaintiffs were entitled to only a "beneficial interest" in certain minerals pursuant to the Termination Act rather than accepting at face value the plaintiffs' allegations claiming entitlement to a *pro rata* share in the entire mineral estate.

The jurisdictional question under 25 U.S.C. § 345, of course, involves a claim for "land" and this is precisely what plaintiffs sought in their complaint.

Accordingly, the Court of Appeals, for purpose of determining the jurisdictional question, committed error in making its determination that plaintiffs were entitled only to a beneficial interest in the mineral estate. Rather, it should have accepted the allegations on the face of the complaint relating to plaintiffs' claim to a share of the mineral estate,[47] and only then,

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[44] See, *e.g.*, Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970), *cert. den.*, 400 U.S. 942 (1970); United States v. Pierce, 235 F.2d 885 (9th Cir. 1956); Gerard v. United States, 167 F.2d 951 (9th Cir. 1948).

[45] *Supra*, note 44.

[46] *Supra*, note 44.

[47] Such an interest is clearly a claim for "land" in the sense of 25 U.S.C. § 345.

after accepting jurisdiction under 25 U.S.C. § 345, proceeded to a determination on the merits as to plaintiffs' entitlement to a *pro rata* share of the minerals. This procedure is the accepted manner of deciding jurisdictional questions and is set out clearly by the Fifth Circuit in the case of *Carter* v. *Seamons*:[48]

> In order to avoid deciding a case on the merits under the guise of resolving the preliminary jurisdictional issues, the courts have adopted the procedure of accepting at face value, for jurisdictional purposes, the averments of the complaint unless they are so transparently insubstantial or frivolous as to afford no possible basis for jurisdiction, and of giving the averments thus accepted their natural jurisdictional consequences.

Since the claim of the plaintiffs to a *pro rata* share of the mineral estate is patently not frivolous or insubstantial, and since it clearly involves a claim to "land" within the meaning of 25 U.S.C. § 345, the Court of Appeals erred in denying jurisdiction in the *Affiliated Ute Citizens* case.

3. The Administrative Procedure Act

The judicial review provisions of the Administrative Procedure Act[49] provide a clear jurisdictional basis for the claims presented in the *Affiliated Ute Citizens* case.

With respect to the doctrine of sovereign immunity, the proposition has become firmly established that the Act constitutes a waiver of the defense. The Court of Appeals for the District of Columbia has held in the strongest language that sovereign immunity is not

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[48] 411 F.2d 767, 770 (5th Cir. 1969).

[49] 5 U.S.C. §§ 701-706.

available when relief is properly sought under the Administrative Procedure Act:

> It seems axiomatic to us that one must imply, from a statement of the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory.[50]

Moreover, this Court has consistently indicated that the judicial review provisions of the Administrative Procedure Act are to be available "not grudgingly" in order to "serve a broad remedial purpose."[51]

Accordingly, since the Administrative Procedure Act provides a waiver of sovereign immunity, the important jurisdictional question in the *Affiliated Ute Citizens* case is whether the review provisions of the Act are applicable under the facts of the case. The Act provides that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.[52]

The agency action by which the plaintiffs are adversely affected and from which they seek review by

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[50] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 874 (D.C. Cir. 1970). See also Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961).

[51] Data Processing Serv. v. Camp, 397 U.S. 150, 156 (1970). See also Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Barlow v. Collins, 397 U.S. 159 (1970); Tooahnippah v. Hickel, 397 U.S. 598 (1970).

[52] 5 U.S.C. § 702.

the courts[53] is the failure of the Secretary to transfer to the mixed-blood members of the Ute Tribe "unrestricted control of all other property held in trust for such mixed-blood member by the United States," [54] including their *pro rata* share of the mineral estate underlying the Reservation.

The validity of the petitioners' claim to a *pro rata* share of the mineral estate is irrelevant to the issue of jurisdiction. The fact remains that there exists a serious question involving the interpretation of 25 U.S.C. § 677o and the distribution of the mineral assets held in beneficial ownership for the mixed-blood members. In this manner, the plaintiffs are adversely affected by the action of the Secretary and a judicial determination of the right to these assets should not be dismissed on a threshold jurisdictional question.

Furthermore, there is nothing in the Administrative Procedure Act which precludes a review of petitioners' claim to their *pro rata* share of the mineral estate. The action of the Secretary in failing to distribute the mineral assets is neither "committed to agency discretion by law",[55] nor are there statutes which "preclude judicial review" [56] of the Secretary's failure to act in accordance with the terms of the Termination Act.

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[53] While this jurisdictional allegation was not made in the courts below, it is clear that this Court is empowered to make a jurisdictional finding whenever jurisdiction exists.

[54] 25 U.S.C. § 677o. Such transfer does not remove the trust obligations of the United States to the mixed-blood members which are established by this section and by other provisions of the Act.

[55] 5 U.S.C. § 701(a)(2).

[56] 5 U.S.C. § 701(a)(1).

Finally, it is clear that the *inaction* of the Secretary of the Interior in failing to distribute the mineral assets constitutes agency *action* under the judicial review provisions of the Administrative Procedure Act.[57]

Accordingly, it is apparent that the Administrative Procedure Act provides a jurisdictional basis for petitioners' claims to a *pro rata* share of the minerals underlying the Uintah and Ouray Reservation.

CONCLUSION

For the foregoing reasons, the Native American Rights Fund respectfully urges the Court to reverse the decision of the Court of Appeals that the Federal District Court lacked jurisdiction in the *Affiliated Ute Citizens* case. The Fund further urges the Court to reverse the lower Court's determination, in *Reyos* v. *First Security Bank,* that the United States had no continuing duty or responsibility to the terminated mixed-blood members of the tribe, and to conclude, in lieu thereof, that the mixed-bloods were entitled to full protection under the Termination Act, including the right to exercise the right-of-refusal established in Section 15 of the Act. Assuming these rights are recognized and enforced for the benefit of the mixed-blood members of the tribe, it follows that the action or inaction of representatives of the United States in the enforcement of such rights was negligent and legally irresponsible and that the mixed-blood members are en-

[57] Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

titled to compensation for the damages which resulted from such action.

Respectfully submitted,

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APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D.C.

MEMORANDUM

Nov. 30, 1956

To: Commissioner of Indian Affairs

From: Acting Assistant Solicitor, Indian Legal Activities

Subject: Interpretation of the word "tribe" as used within the Act of August 27, 1954 (68 Stat. 868).

You request our interpretation of the word "tribe" as frequently used in the Act of August 27, 1954, P.L. 671, 68 Stat. 868, in view of the provision of section 5 that, after publication of the final roll, the tribe "shall thereafter consist exclusively of full-blood members." You refer to the resolution adopted by the board of directors of the Affiliated Ute Citizens of the State of Utah, which assumes that the Secretary of the Interior's required protection of minor members of the tribe (sec. 22) thereafter applies only to "full-blood members."

You also question the meaning of "tribe" in Section 15, which requires that a mixed-blood member who wishes to dispose of certain property ". . . shall first offer it to the members of the tribe . . .".

"Tribe" is defined as "Ute Indian Tribe of the Uintah and Ouray Reservation, Utah." (Section 2(a)). "Full-blood" means a *member of the tribe* who possesses one-half degree of the Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 4 hereof." (Section 2(b)). "Mixed-blood" means "a *member of the tribe* who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and

those who become mixed-bloods by choice under the provisions of section 4 hereof." (Section 2(c)). (Emphasis added).

Section 8 provides for the roll "of full-blood *members of* the tribe" and for a roll of "the mixed-blood *members of the tribe.*" (Emphasis added). After publication of the final rolls, the "mixed-blood" group of Indians are still considered as "members of the tribe" within this definition. For example, section 18 states that "The laws of the United States with respect to probate of wills, determination of heirship, and the administration of estates shall apply to the individual trust property of mixed-blood members of the tribe until Federal supervision is terminated. * * * "

Sections 19, 20 and 21 reserve certain rights and privileges of "the tribe" and "of its members" and clearly refer to all members of "the tribe", and not only to the full-blood organization and its members after publication of the final roll. Section 23 refers to "each individual mixed-blood member of the tribe", and section 24 refers to "the business committee of the tribe representing the full-blood group thereof", also recognizing that "tribe" refers to both groups. Again, in sections 14 and 15, the Act distinguishes a "member of the mixed-blood group" from "members of the tribe." In fact, throughout there is a considered use of the expressions "members of the tribe", "mixed-blood members of the tribe", and "full-blood members of the tribe", to distinguish the three classes.

The sentence "mixed-blood *members* shall have no interest therein except as otherwise provided in this Act", follows the sentence in section 5, to which you refer, that the "tribe shall consist" exclusively of full-blood members after the tribal *rolls* have been published. In spite of the somewhat confusing language of the first sentence of this section, the second sentence clearly implies that the mixed-blood members continue to have a tribal relationship, i.e., "an interest therein [in the tribe] as * * * provided in this

Act." In fact, this is so. The "full-blood members" are the only persons thereafter recognized on the full-blood tribal roll, but the mixed-blood members of the tribe continue to have tribal membership for certain purposes set forth in the Act. You will also note that the rolls referred to in the first sentence are the rolls "of the full-blood members of the tribe" and of the "*mixed-blood members of the tribe.*"

It seems reasonably sure, therefore, that the word "tribe" as used in sections 15 and 22, and elsewhere throughout the Act, refers to both "full-blood" and "mixed-blood" members, unless specifically limited to one or the other of these classes of tribal members.

FRANKLIN C. SALISBURY
Acting Assistant Solicitor
Indian Legal Activities

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-78

AFFILIATED UTE CITIZENS OF THE
STATE OF UTAH, et al,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

ANITA REYOS, et al,

Petitioners,

v.

FIRST SECURITY BANK OF UTAH, N.A.,
UNITED STATES OF AMERICA, JOHN B.
GALE AND VERL HASLEM,

Respondents.

CERTIFICATE OF SERVICE OF BRIEF AMICUS CURIAE
OF NATIVE AMERICAN RIGHTS FUND

I, Wallace L. Duncan, a member of the Bar of the above-entitled Court, representing the Native American Rights Fund as Amicus Curiae, do hereby certify that I have served three copies of the brief for the Native American Rights Fund on each of the following named attorneys by mail by depositing the same in a United States post office or mail box with pre-paid postage addressed to the following counsel at the add-

resses indicated. Copies to those parties residing more than 500 miles from the undersigned were sent air mail, postage prepaid.

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Dated this 30th day of August, 1971.

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